

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

VERNON CLYDE JAMES MARTINEZ,

Plaintiff,

v.

No. 16cv1044 RB/KBM

COCA COLA BOTTLING OF SANTA FE, NM,
KATHY HART, and
JIM HART

Defendants.

MEMORANDUM OPINION AND ORDER
GRANTING MOTION TO PROCEED *IN FORMA PAUPERIS* AND
DISMISSING COMPLAINT

THIS MATTER comes before the Court on *pro se* Plaintiff's Application to Proceed in District Court Without Prepaying Fees or Costs, Doc. 2, filed September 21, 2016 ("Application"), and on his Civil Rights Complaint Pursuant to 42 U.S.C. § 1983, Doc. 1, filed September 21, 2016 ("Complaint"). For the reasons stated below, the Court will **GRANT** Plaintiff's Application and **DISMISS** Plaintiff's Complaint **without prejudice**. Plaintiff shall have 21 days from entry of this Order to file an amended complaint. Failure to timely file an amended complaint may result in dismissal of this case without prejudice.

Application to Proceed *in forma pauperis*

The statute for proceedings *in forma pauperis*, 28 U.S.C. § 1915(a), provides that the Court may authorize the commencement of any suit without prepayment of fees by a person who submits an affidavit that includes a statement of all assets the person possesses and that the person is unable to pay such fees.

When a district court receives an application for leave to proceed *in forma pauperis*, it should examine the papers and determine if the requirements of [28 U.S.C.] § 1915(a) are satisfied. If they are, leave should be granted. Thereafter,

if the court finds that the allegations of poverty are untrue or that the action is frivolous or malicious, it may dismiss the case[.]

Menefee v. Werholtz, 368 Fed.Appx. 879, 884 (10th Cir. 2010) (citing *Ragan v. Cox*, 305 F.2d 58, 60 (10th Cir. 1962). “[A]n application to proceed *in forma pauperis* should be evaluated in light of the applicant's present financial status.” *Scherer v. Kansas*, 263 Fed.Appx. 667, 669 (10th Cir. 2008) (citing *Holmes v. Hardy*, 852 F.2d 151, 153 (5th Cir.1988)). “The statute [allowing a litigant to proceed *in forma pauperis*] was intended for the benefit of those too poor to pay or give security for costs....” *Adkins v. E.I. DuPont de Nemours & Co.*, 335 U.S. 331, 344 (1948). While a litigant need not be “absolutely destitute,” “an affidavit is sufficient which states that one cannot because of his poverty pay or give security for the costs and still be able to provide himself and dependents with the necessities of life.” *Id.* at 339.

The Court will grant Plaintiff’s Application to Proceed in District Court Without Prepaying Fees or Costs. Plaintiff signed an affidavit declaring that he is unable to pay the costs of these proceedings and that the following information is true: (i) his monthly income is \$0.00; (ii) his monthly expenses are \$1,176.00; (iii) he has no cash, has only \$23.00 in a checking account, and his only asset is a 1999 vehicle; and (iv) he is unemployed. The Court finds that Plaintiff is unable to pay the filing fee because he has no monthly income and is unemployed.

Dismissal of Proceedings *In Forma Pauperis*

The statute governing proceedings *in forma pauperis* requires federal courts to dismiss an *in forma pauperis* proceeding that “is frivolous or malicious; ... fails to state a claim on which relief may be granted; ... or seeks monetary relief against a defendant who is immune from such relief.” See 28 U.S.C. § 1915(e)(2). “Dismissal of a *pro se* complaint for failure to state a claim is proper only where it is obvious that the plaintiff cannot prevail on the facts he has alleged and it

would be futile to give him an opportunity to amend.” *Kay v. Bemis*, 500 F.3d 1214, 1217 (10th Cir. 2007). “In determining whether a dismissal is proper, we must accept the allegations of the complaint as true and construe those allegations, and any reasonable inferences that might be drawn from them, in the light most favorable to the plaintiff.” *Kay v. Bemis*, 500 F.3d at 1217. The Court looks to the specific allegations in the complaint to determine whether they plausibly support a legal claim for relief, i.e. the factual allegations must be enough to raise a right to relief above the speculative level. *See id.* at 1218 (*quoting Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). Dismissal of an *in forma pauperis* complaint as frivolous is not an abuse of discretion based on a determination that the *pro se* litigant did not state a viable legal claim and that the complaint consisted of little more than unintelligible ramblings. *Triplett v. Triplett*, 166 Fed.Appx. 338, 339-340 (10th Cir. 2006). However, “pro se litigants are to be given reasonable opportunity to remedy the defects in their pleadings.” *Hall v. Bellmon*, 935 F.2d 1106, 1110 n.3 (10th Cir. 1991).

Plaintiff brings this case pursuant to 42 U.S.C. § 1983 and appears to assert claims for denial of equal protection and due process. *See* Complaint at 2. Plaintiff also appears to assert claims under Title VII and the Americans with Disabilities Act. *See* Complaint at 2. The only factual allegations in the Complaint indicate that Plaintiff was an employee at Coca Cola Bottling of Santa Fe and was exposed to carbon monoxide exhaust from the fleet at Coca Cola Bottling of Santa Fe. The Complaint also alleges Defendants Kathy Hart and Jim Hart are owners of Coca Cola Bottling of Santa Fe.

Plaintiff fails to state a claim pursuant to 42 U.S.C. § 1983 because Defendants are not state actors. Section 1983 only authorizes suits against persons acting under color of state law.

See McCarty v. Gilchrist, 646 F.3d 1281, 1285 (10th Cir. 2011)(“Section 1983 provides a federal civil remedy for the deprivation of any rights, privileges, or immunities secured by the Constitution by any person acting under color of state law”). The “state action doctrine requires that the deprivation must be caused by the exercise of some right or privilege created by the State or by a rule of conduct imposed by the state or by a person for whom the State is responsible and the party charged with the deprivation must be a person who may fairly be said to be a state actor.” Stone v. Elohim, Inc., 336 Fed.Appx. 841, 842 (10th Cir. 2009) (quoting Lugar v. Edmondson Oil Co., Inc., 457 U.S. 922, 937 (1982)). “Private persons may be said to act under color of state law if they are jointly engaged with state officials in the challenged action . . . But private conduct that is not fairly attributable to the State is simply not actionable under § 1983, however discriminatory or wrongful the conduct is.” Hall v. Witteman, 584 F.3d 859, 864 (10th Cir. 2009).

Plaintiff also fails to state a claim pursuant to Title VII and the Americans with Disabilities Act (“ADA”). A plaintiff may prove discrimination in violation of Title VII of the Civil Rights Act, 42 U.S.C. § 2000e–2(a)(1), and 42 U.S.C. § 1981, by presenting direct evidence of discriminatory motivation, such as statements made by a supervisor showing racial bias. See *Kendrick v. Penske Transp. Servs., Inc.*, 220 F.3d 1220, 1225 (10th Cir. 2000). In the absence of direct evidence of racial discrimination, a plaintiff initially must prove a prima facie case of discrimination by showing “(1) he was a member of a protected class; (2) he was qualified and satisfactorily performing his job; and (3) he was terminated under circumstances giving rise to an inference of discrimination.” *Salguero v. City of Clovis*, 366 F.3d 1168, 1175 (10th Cir. 2004); 42 U.S.C. § 20003-2(a)(1) (Title VII prohibits, among other things, an employer “to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with

respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin”). “To establish a prima facie case of discrimination under the ADA, [Plaintiff] must show (1) he is disabled (or perceived as disabled) as defined by the ADA, (2) he is qualified to perform the essential functions of his job with or without reasonable accommodation, and (3) he suffered discrimination as a result of his disability.” *Koessel v. Sublette County Sheriff's Dept.*, 717 F.3d 736, 742 (10th Cir. 2013). Plaintiff does not allege that Defendants discriminated against him because of his race, color, religion, sex, national origin, or disability. Nor has he alleged that he is a member of a protected class, is disabled (or perceived as disabled) as defined by the ADA, and is qualified to perform the essential functions of his job.

The Court will dismiss the Complaint for failure to state a claim and for lack of jurisdiction. Plaintiff shall have 21 days from entry of this Order to file an amended complaint. *See Hall v. Bellmon*, 935 F.2d 1106, 1110 n.3 (10th Cir. 1991) (“pro se litigants are to be given reasonable opportunity to remedy the defects in their pleadings”). Failure to timely file an amended complaint may result in dismissal of this case without prejudice.

Compliance with Rule 11

While the Court will permit Plaintiff to file an amended complaint, he must do so consistent with Rule 11 of the Federal Rules of Civil Procedure. *See Yang v. Archuleta*, 525 F.3d 925, 927 n. 1 (10th Cir. 2008) (“*Pro se* status does not excuse the obligation of any litigant to comply with the fundamental requirements of the Federal Rules of Civil and Appellate Procedure.”). Rule 11(b) provides:

Representations to the Court. By presenting to the court a pleading, written motion, or other paper--whether by signing, filing, submitting, or later advocating

it--an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances:

- (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation;
- (2) the claims, defenses, and other legal contentions are warranted by existing law or by a nonfrivolous argument for extending, modifying, or reversing existing law or for establishing new law;
- (3) the factual contentions have evidentiary support or, if specifically so identified, will likely have evidentiary support after a reasonable opportunity for further investigation or discovery; and
- (4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on belief or a lack of information.

Fed. R. Civ. P. 11(b). Failure to comply with the requirements of Rule 11 may subject Plaintiff to sanctions, including monetary penalties and nonmonetary directives. *See* Fed. R. Civ. P. 11(c).

Service on Defendants

Section 1915 provides that the “officers of the court shall issue and serve all process, and perform all duties in [proceedings *in forma pauperis*]”). 28 U.S.C. § 1915(d). Rule 4 provides that:

At the plaintiff’s request, the court may order that service be made by a United States marshal or deputy marshal or by a person specially appointed by the court. The court must so order if the plaintiff is authorized to proceed in forma pauperis under 28 U.S.C. § 1915 or as a seaman under 28 U.S.C. § 1916.


Fed. R. Civ. P. 4(c)(3).

The Court will not order service of Summons and Complaint on Defendants at this time. The Court will order service if Plaintiff timely files an amended complaint which states a claim, and which includes the address of every defendant named in the amended complaint.

IT IS ORDERED that Plaintiff’s Application to Proceed in District Court Without

Prepaying Fees or Costs, Doc. 2, filed September 21, 2016, is **GRANTED**.

IT IS ALSO ORDERED that Plaintiff's Civil Rights Complaint Pursuant to 42 U.S.C. § 1983, Doc. 1, filed September 21, 2016, is **DISMISSED without prejudice**. Plaintiff may file an amended complaint within 21 days of entry of this Order.


UNITED STATES DISTRICT JUDGE